

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARILYN HIGGINS

Claimant

VS.

BEECH AIRCRAFT CORPORATION

Respondent

Self-Insured

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Docket No. 205,097

ORDER

The respondent, a self-insured, requests review of the preliminary hearing Order by Administrative Law Judge John D. Clark dated November 21, 1995.

ISSUES

The Administrative Law Judge granted claimant benefits. The respondent requests review of that Order. The issues now before the Appeals Board are: (1) whether claimant sustained personal injury by accident arising out of and in the course of her employment with the respondent, and (2) whether claimant provided timely notice of accident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, for purposes of preliminary hearing the Appeals Board finds:

(1) The Appeals Board has the jurisdiction and authority to review preliminary hearing findings involving questions whether claimant sustained personal injury by accident arising out of and in the course of employment and questions whether claimant gave timely notice of accident as required by K.S.A. 44-520.

Claimant requested the Appeals Board order additional temporary total disability benefits. The Appeals Board does not have the authority and jurisdiction to review that issue at this juncture in the proceeding because it is not one of the findings subject to review under K.S.A. 44-534a and the Administrative Law Judge did not exceed his jurisdiction in failing to order those past due benefits.

(2) The preliminary hearing Order should be affirmed.

Claimant alleges injury to her hands, arms, shoulders and neck from May 1995 through each and every working day thereafter. Claimant first complained of shoulder problems in 1991 when she spoke to Ray Lagpacan, respondent's workers compensation representative, who told her that at her age the body begins to deteriorate. Claimant continued working for the respondent and experienced further problems with her right upper extremity. In August 1991, claimant sought treatment from orthopedic surgeon Robert L. Eyster, M.D., who performed right rotator cuff repair one month later. Claimant returned to work for the respondent and in September 1993 reported an accident. At that time she indicated she had injured her right arm and right shoulder in July 1993 while routing.

Claimant continued to work for the respondent and in May 1995 began to experience severe pain in her right shoulder. Her job duties at that time included drilling, riveting, countersinking, bonding and sanding. Continuing to work until June 20, 1995, when she left for surgery, claimant developed additional problems in her left arm and shoulder. Claimant testified she believed her physical problems were caused by the pressure from drilling parts and performing her other work duties. However, she also testified that in May 1995 she was not sure her problems were work related. In June 1995, claimant sought additional treatment from Dr. Eyster. His office notes from June 7, 1995 indicate that claimant was experiencing bilateral shoulder pain that "came on insidiously and slowly." Dr. Eyster diagnosed recurrent rotator cuff tear of the right shoulder and performed rotator cuff repair surgery on June 20, 1995. After a conversation with Dr. Eyster, who allegedly asked claimant if she had filed for workers compensation benefits, claimant notified her supervisors when she returned to work in July 1995 that her work was causing the problems that she was experiencing. In his office notes dated August 8, 1995, Dr. Eyster wrote:

"Pt. told me that she is going to pursue work comp. I told her that basically it's up to the administrative law judge as to whether this is work compensable. Basically it depends on whether the injury actually occurred at work, whether she met the filing requirements and so forth. As far as her dx she had a rotator cuff tear. This is usually a degen. process sometimes aggravated by work but that is up to work comp to determine in my opinion. I have no opinion medically."

Claimant is presently working for the respondent performing her usual job duties and reports that she is experiencing ongoing problems in her shoulders and neck. Although claimant states that she is unsure whether her present problems are related to her work activities, she testified she does not do anything away from the job that causes the symptomatology that she experiences while working.

At her deposition, claimant testified that she did not give notice of accident sooner because it was not clear to her that her problems were work related until she returned to work after surgery and continued to experience difficulties. Also, she testified she did not initially think it important when she began to experience the symptoms in May 1995 and did not realize that she was required to report every pain to first aid, especially when she was unsure that it was caused by her work. However, on cross-examination claimant testified she knew with "absolute positivity" that her work was causing her problems as early as May 1995, and that she was afraid to notify respondent because she did not want to lose her job. At the preliminary hearing, which was held after her deposition, claimant again testified she was unsure in May 1995 whether or not her problems were work related.

Based upon the above evidence, the Administrative Law Judge found that claimant had sustained a compensable accident while working for the respondent and that just cause existed to excuse claimant's failure to provide notice of accident within ten days of its occurrence.

Respondent contends claimant failed to prove she sustained personal injury by accident arising out of and in the course of her employment with respondent. The Appeals Board disagrees. Based upon claimant's testimony that her job required drilling, riveting, countersinking, bonding and sanding, along with Dr. Eyster's office notes that indicate claimant has a degenerative process that may be aggravated by work, the Appeals Board finds that claimant has satisfied her burden of proof for preliminary hearing purposes regarding the issue of accidental injury.

Respondent also contends that claimant did not establish just cause to extend the period for providing notice of accident. In the Judge's finding of just cause, it is implicit that the Administrative Law Judge found claimant to be a credible witness and her testimony convincing. Because the Judge had an opportunity to observe claimant and assess her demeanor, the Appeals Board will give some deference to the Judge's opinion, despite the fact that claimant seemed to contradict herself regarding whether she knew her work was related to her problems in May 1995. Based upon claimant's testimony that Ray Lagpacan told her in 1991 that her shoulder problems were not related to her work, coupled with her lack of personal knowledge in May and June 1995 that her shoulder problems were work related, the Appeals Board finds claimant did establish just cause to excuse the failure of providing respondent with notice of accident within ten days of its occurrence. Claimant left work on June 20, 1995 to undergo shoulder surgery. Based upon the evidence presented, that date appears to be the date of accident for purposes of this claim. Therefore, notice of accident given respondent in July 1995 is within 75 days of the date of accident and within the time limits set forth by K.S.A. 44-520.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge John D. Clark dated November 21, 1995, should be, and hereby is, affirmed.

IT IS SO ORDERED.

Dated this ____ day of February 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: David Farris, Wichita, KS
Terry J. Torline, Wichita, KS

MARILYN HIGGINS

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John D. Clark, Administrative Law Judge
Philip S. Harness, Director